United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

Orig w/affidavit of mailing

75-1190

To be argued by
GARY A. WOODFIELD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1190

UNITED STATES OF AMERICA,

Appellee,

—against—

DONALD SHERMAN,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF AND APPENDIX FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
GARY A. WOODFIELD,
Assistant United States Attorneys,
Of Counsel.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1190

UNITED STATES OF AMERICA,

Appellee,

—against—

DONALD SHERMAN,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellant Donald Sherman appeals from the denial of his motion to withdraw his plea of guilty and from the judgment of conviction and sentence entered on April 25, 1975 by the United States District Court (Weinstein, *J*) for the Eastern District of New York.

On March 3, 1975 appellant entered a plea of guilty to a one count superseding information, 75 Cr. 154, which charged appellant with supplementing the income of a government employee, in violation of Title 18, United States Code, Sections 209 and 2. This plea was in satisfaction of the underlying indictment, 72 Cr. 596, which originally charged appellant with ten counts of bribery, in violation of Title 18, United States Code, Sections 201(b)(1) and 2, ten counts of submitting false statements in connection with applications for mortgage insurance to the Federal Housing Administration (hereinafter "FHA"), in violation of Title

18, United States Code, Sections 1010 and 2, as well as conspiracy to do the same.

Appellant, prior to sentencing, sought to withdraw his plea of guilty pursuant to Rule 32(d), Federal Rules of Criminal Procedure. After a hearing, appellant's motion was denied and he was sentenced to a term of imprisonment of one year to serve one month in a community treatment center, plus a fine of $5,000. Appellant is currently free on bail pending the outcome of the instant appeal.

On appeal, appellant has reiterated the arguments raised in the district court prior to his sentencing on April 25, 1975 to support his motion to withdraw his plea, alleging: (1) the plea was not voluntary due to the district court's alleged failure to advise him of certain constitutional rights; (2) he was coerced to plead by the threat of additional prosecution thus, such plea was involuntary; (3) the plea was a nullity because the crime charged in the superseding information was barred by the statute of limitations, and (4) alternatively, any sentence imposed based on a crime barred by the statute of limitations is unlawful.

Statement of Facts

Appellant was one of forty individuals named in twelve indictments arising out of a federal grand jury's investigation into wide-ranging abuses by the real estate industry regarding FHA programs and insured mortgages. These indictments were superseded, and appellant, named in superseding indictment 72 Cr. 596, was charged with ten counts of indirectly bribing the FHA Staff Appraiser Edward Goodwin (18 U.S.C., §§ 201(b)(1) and 2), ten counts of submitting false statements in connection with applications for mortgage insurance to the FHA (18, U.S.C. § 1010 and § 2) and conspiring to do the same (18, U.S.C. § 371).*

* On December 17, 1974 the false statement counts against appellant were dismissed on motion by the government.

During the course of plea negotiations on the underlying indictment, the government, as it had with all defendants in the FHA related indictments, advised appellant's counsel of the goverenment's continuing investigation of allegations of fraud and bribery relating to mortgages on real estate insured by the FHA and Veteran's Administration (hereinafter "VA"). Furthermore, counsel for appellant was advised that as a result of this ongoing investigation additional allegations of bribery by appellant to FHA staff appraisers and VA fee appraisers had been discovered and the possibility existed that a new indictment against appellant would be returned. It was thereupon agreed that appellant would plead guilty to a misdeameanor based upon a count in the underlying indictment in satisfaction of that indictment, and all other FHA and VA related offenses which occurred prior to the entrance of the plea of guilty (10A, 11A).*

On March 3, 1975 a one count superseding information was filed to which the appellant pled guilty (3A-15A). This information alleged, in substance, that on or about September 19, 1969 the appellant aided and abetted the supplementation of the salary of a government employee, FHA Staff Appraiser Edward Goodwin, in the amount of $50 in violation of Title 18, United States Code, Sections 209 and 2 (3A).

At the time of the entry of this guilty plea, the district court entered into a discussion with appellant illiciting certain background information. Appellant advised the court that he had a Bachelor of Laws degree although he was not a member of the bar (4A, 5A). In response to the court's inquiry regarding any treatment for mental or emotional problems, appellant stated that he was presently under the care of a psychiatrist (5A). Further inquiry

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* References are to the appellant's appendix, unless otherwise noted.

as to this treatment revealed that appellant was presently taking tranquilizers prescribed by his psychiatrist (6A). Thereafter, the following colloquy took place (7A-8A):

> The Court: Have they interfered with your ability to reason clearly and understand the nature of these proceedings?
>
> The Defendant: Not at all.
>
> The Court: In your opinion, Mr. O'Brien, having discussed this with your client presumably over many months, is he, in your opinion, capable of understanding the proceedings?
>
> Mr. O'Brien: Yes, your Honor.
>
> The Court: And of making the necessary decisions?
>
> Mr. O'Brien: Yes, your Honor. I also did receive a letter from the psychiatrist and it really stated that Mr. Sherman was depressed. I showed a copy of that letter to the U.S. Attorney and, in my opinion, there is no legal reason why Mr. Sherman doesn't understand the nature of the proceedings and the consequences of his acts and that he's fully competent to enter a plea.
>
> The Court: He appears to be alert and understanding to me, but if you require time for a hearing on this issue, I will be happy to give it to you.
>
> Mr. O'Brien: No, your Honor. We waive a hearing.

The court continued questioning appellant regarding any threats or promises that may have been made to him to induce this plea and discussed the maximum sentence that could be imposed (8A-9A). Appellant affirmatively stated that no threats had been made to induce him to plead guilty (12A). Thereafter, the agreement previously reached between the government and appellant was fully stated on the record (10A-12A).

The court then read the information to appellant and advised him of various rights he was waiving by pleading guilty: the right to a jury trial, the government's burden of proving its case beyond a reasonable doubt, the right to appeal (12A, 13A). The court also stated (12A-13A):

> The Government would have to prove you guilty beyond a reasonable doubt and you would have many other protections.
>
> Have you discussed them with your attorney?
>
> The Defendant: Yes.
>
> The Court: Do you wish to waive them?
>
> The Defendant: Yes.

Thereafter, the appellant stated in his own words his involvement in the indirect bribes to Edward Goodwin, admitting his guilt to the superseding information (13A-14A). The court concluded this line of inquiry by asking (14A):

> Is there any other inquiry I should make at this time?
>
> Mr. O'Brien: No, your Honor.
>
> The Court: Any other inquiry?
>
> Mr. Woodfield: No, your Honor.
>
> The Court: Do you have any questions you wish to ask me?
>
> The Defendant: None whatsoever.

On April 25, 1975, prior to imposing sentence, a hearing was held regarding appellant's motion to withdraw his guilty plea. Appellant initially argued that his plea was barred by the statute of limitations, contending that the superseding information to which he pled guilty, did not arise out of the underlying indictment (28A-29A). The government contended in an affidavit in opposition (21A-25A) that the superseding information, in fact, arose from count 22 of the underlying indictment, 72 Cr. 596, as corrected by the government's bill of particulars (22A-

23A).* At oral argument the government further contended that it would suffer prejudice due to the disbanding of its witnesses, removal of FHA files, and failure to continue its investigation into allegations of additional bribes paid by appellant to FHA and VA appraisers due to appellant's agreement to enter and subsequent entrance of a guilty plea (30A-32A). The court considered any prejudice the government might suffer and raised the question of whether the appellant waived his right to contest the statute of limitations by pleading guilty, but made no specific rulings on these issues (32A, 33A).

Appellant next contended that his plea was involuntary due to his fear of possible further prosecution, together with his "emotional instability." (34A-35A). The court after reading the minutes of appellant's plea in its entirety, stated (35A):

> I observed him carefully. I questioned him carefully and there is not the slightest doubt in my mind, based on my observation of him on a number of occasions, and the reports which I have carefully studied, and my questioning of him, that he is perfectly competent to respond.

Concerning the inquiry of appellant in obtaining a factual basis for the plea, the court stated (36A, 37A):

> It is clear to me, based on the statement of the defendant at Pages 12 and 13, in light of my knowledge of all these FHA cases—I have read extensive records, and of the knowledge of the defendant, that what he was agreeing to was that he had engaged in this conspiracy. For that reason my inquiry was not more extensive, but there wasn't any doubt in anybody's mind at the table that this was sufficient to constitute a full inquiry under—what is it, Rule 11?

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* Count 22, as excerpted from indictment 72 Cr. 596, and pertinent portions of the government's bill of particulars have been reproduced as part of our appendix, annexed hereto at pp. A-1, A-2.

The court denied appellant's motion to withdraw his guilty plea and appellant was sentenced to one year to serve one month in a community treatment center plus a $5,000 fine (53A). It is from the denial of appellant's motion and sentence that this appeal is taken.

ARGUMENT

POINT ONE

Appellant's plea was understandingly, knowingly and voluntarily entered.

Appellant raises various arguments to support his contention that his plea was involuntarily entered. However, he does not dispute the fact that he was fully advised of the nature of the offense to which he pled and the consequences of his plea. Therefore, it is clear that this is not a case involving the standard announced in *McCarthy* v. *United States,* 394 U.S. 459 (1969), which allows appellant to plead anew if the record does not affirmatively disclose specific advice as to the consequences of the plea and the defendant's understanding of the nature of the offense. See, *Ferguson* v. *United States,* 513 F.2d 1011 (2d Cir. 1975); *Irizarry* v. *United States,* 508 F.2d 960 (2d Cir. 1974); *Michel* v. *United States,* 507 F.2d 461 (2d Cir. 1974). Rather, when the question is whether or not the plea was voluntarily entered, the totality of the circumstances must be considered. *Brady* v. *United States,* 397 U.S. 742, 749 (1970).

The district court, in denying appellant's request to withdraw his plea, considered the same contentions appellant now raises on appeal, and rejected them, finding that appellant had in fact entered his plea voluntarily, in full understanding of the charges against him and the consequences of his plea. The district court's ruling was entirely

proper, and thus, should not be disturbed. *United States* v. *Rich,* Slip op. 862 (2d Cir., April 16, 1975); *United States* v. *Lombardozzi,* 436 F.2d 878 (2d Cir.), *cert. denied* 402 U.S. 908 (1971); *United States* v. *Girliano,* 348 F.2d 217 (2d Cir.), *cert. denied* 382 U.S. 946 (1965).

(1)

Appellant initially contends that the trial court's failure to enumerate all three constitutional rights discussed in *Boykin* v. *Alabama,* 395 U.S. 238 (1969), renders his plea involuntary. Based upon the facts and the law, appellant's contention is clearly misplaced.

In *Boykin* v. *Alabama, supra,* the Supreme Court imposed a new requirement in accepting guilty pleas. "The new element added in *Boykin* was the requirement that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily." *Brady* v. *United States,* 397 U.S. 742, 747-8 n. 4 (1970). Although *Boykin* does expressly discuss three constitutional rights which are waived by a guilty plea—the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination—these rights were set out to demonstrate the gravity of the trial court's responsibility, and not, as appellant contends, to impose a procedural requirement that they be enumerated. *Stinson* v. *Turner,* 473 F.2d 913, 915 (10th Cir. 1973).

Our conclusion that *Boykin* does not compel the recitation by the trial judge of a "catechism of the constitutional rights that are waived by entry of a guilty plea." (*Wade* v. *Coiner,* 468 F.2d 1059, 1061 (4th Cir. 1972)), finds support in the decisions of every single circuit which has ruled on this issue (See *Todd* v. *Lockhart,* 490 F.2d 626, 628 (8th Cir. 1974); *Stinson* v. *Turner, supra; United States* v. *Dorsynski,* 484 F.2d 849, 851 (7th Cir. 1973); *United States* v. *Sherman,* 474 F.2d 303 (9th Cir. 1973); *Wade* v. *Coiner,*

supra; Davis v. *United States,* 470 F.2d 1128 (3rd Cir. 1972); but see *In re Tahl,* 460 P.2d 449 (Cal. 1969).

Moreover, a review of the plea minutes in the case at bar clearly indicates satisfaction with the requirements established in *Boykin,* and *McCarthy* as well—that is—that the record affirmatively disclose that the defendant's plea was entered voluntarily and understandingly. Furthermore, the facts in the instant matter are in dramatic contradistinction to the facts in *Boykin.* In *Boykin,* a 27 year old indigent pleaded guilty to five counts of robbery three days after counsel was appointed and was subsequently sentenced to death. The record did not indicate that the trial judge asked any questions of the defendant concerning his plea, and the defendant did not address the court.

In the case at bar, appellant, who possessed a law degree, was represented by competent counsel for three years, and pled guilty pursuant to a protracted plea bargain from which he realized significant advantage. The district court specifically instructed appellant that by pleading guilty he was waiving: (1) his right to a jury trial; (2) his right to be proven guilty beyond a reasonable doubt; and (3) his right to appeal his conviction. The trial judge also advised appellant that he was waiving many other protections and specifically inquired whether appellant had discussed them with his attorney, and whether he wished to waive them (12A-13A). Appellant unequivocally responded in the affirmative. Further, before accepting the plea the trial judge asked appellant if he had "any questions that [he] wish[ed] to ask," and asked appellant's counsel if there was any other inquiry that he should make? Both replied in the negative (14A).

Although it may be salutary in general for a judge to state all the rights discussed in *Boykin* to the defendant, it is clear that in this case, the judge's failure to do so, in no way resulted in an unknowing waiver of these rights by appellant. Indeed, appellant does not now contend that he

was unaware of the rights that he waived by pleading guilty; instead he maintains that the plea is involuntary *merely* because the record does not enumerate all the rights discussed in *Boykin*. Where, however, as in this case, the plea minutes reveal that appellant himself had a law degree, he was represented by competent counsel, he affirmatively answered that he knew and had discussed with his attorney the rights he was waiving by pleading guilty, and he was specifically reminded of a number of these rights, then the trial judge has adequately satisfied the *Boykin* requirement of an affirmative showing of a knowing and voluntary waiver by the appellant himself of his constitutional rights.

(2)

Appellant next contends that his plea was involuntary because fear, induced by the possibility of a superseding indictment, was the motivation behind his plea, rather than his actual guilt.* This, coupled with his "emotional instability" rendered his plea involuntary.

Appellant's plea of guilty to a superseding information was entered only after protracted negotiations between appellant's counsel and the government. During the course of these negotiations the government advised appellant's counsel that additional evidence involving appellant in other

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* Appellant's contention for the first time raised here on appeal, that he was not guilty of the crime is frivolous. At the time of the plea appellant admitted to the crime stating in his own words, his actual involvement (13A, 14A). Further, during argument of appellant's motion to withdraw his plea, Judge Weinstein reaffirmed his finding, based on appellant's earlier admissions, that appellant himself had established a factual basis for the plea (36A, 37A). In any event, a bare assertion of innocence is not sufficient to compel granting a motion to withdraw a guilty plea. *United States* v. *Hughes*, 325 F.2d 789, 792 (2d Cir.), *cert. denied*, 377 U.S. 907 (1964); *United States* v. *Lester*, 247 F.2d 496, 501 (2d Cir. 1964); see also *United States* v. *Norstrand Corp.*, 168 F.2d 481 (2d Cir. 1948).

FHA and VA related criminal activity had been discovered and, that a plea at this time would satisfy these additional crimes as well as the outstanding indictment (See Government's Affidavit in Opposition, 23A).

We contend that our actions in these plea negotiations were entirely proper (as appellant concedes, Appellant's Brief, p. 8), and in full compliance with both the letter and spirit of the law governing plea bargains *Santobello* v. *New York,* 404 U.S. 257 (1971); *Brady* v. *United States,* 397 U.S. 742 (1970); *United States* v. *Needles,* 472 F.2d 652 (2d Cir. 1973).* Judge Weinstein, confronted with appellant's claim of "coercion," properly rejected it, finding that appellant's plea was voluntarily entered.

In *Brady* v. *United States, supra,* 397 U.S. at 749, the Court held that consideration of all the relevant circumstances surrounding a guilty plea must be made to determine its voluntariness. There, while the Court stated that a guilty plea may not be a product of "mental coercion overbearing the will of the defendant," the Court held that pleas, motivated in part by governmental promises are not invalid, *Brady* v. *United States, supra,* 397 U.S. at 750. The Court stated, (*id.*, at 751):

> We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and or higher penalty authorized by law for the crime charged.

A review of all the surrounding circumstances of the case at bar clearly reveal that the plea negotiations were entirely proper and, consequently, appellant's plea was

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* Indeed, the prosecutor would have been remiss had he not disclosed to appellant this material information so that appellant could intelligently decide whether to plead or go to trial.

voluntarily and intelligently entered.* Appellant, advised by competent counsel, who had full opportunity to assess the advantages and disadvantages of going to trial as opposed to pleading guilty, and not subjected to any face-to-face encounters with the authorities, pled guilty to a significantly reduced charge in open court before a judge aware of the requirements of the law concerning guilty pleas.

Appellant's further contention that his plea was involuntary because of "emotional instability" is likewise without merit. At the time of the entry of his plea, the court questioned appellant concerning his psychiatric care and the medication he was presently taking (5A-6A). Appellant responded that his medication did not interfere with his ability to reason clearly and to understand the proceedings (7A). Further questioning by the court illicited appellant counsel's opinion that his client was ". . . fully competent to enter a plea." And he waived a hearing to consider the issue of competency (8A). The court also made a personal observation of the appellant's alertness and ability to understand the proceedings (8A).

These findings made at the time of appellant's entry of his plea were reaffirmed by the court during oral argument of appellant's motion to withdraw his plea (35A):

> The Court: I observed him carefully. I questioned him carefully and there is not the slightest doubt in my mind, based on my observation of him on a number of occasions, and the reports which I have carefully studied, and my questions of him, that he is perfectly competent to respond.

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* Appellant does not contend, nor is this the case where the government improperly employed its powers by threatening prosecution on a charge not justified by the evidence to induce a guilty plea. The government's promise to accept a plea in satisfaction of additional crimes, where there is a factual basis for additional prosecution, is proper. *Meyer* v. *United States*, 424 F.2d 1181 (8th Cir. 1970).

. . .

> The Court: I gave you an opportunity for a hearing on this issue and you rejected it at Page 7 [plea minutes, 8A] and you indicated that you yourself had no doubt of his competency.
>
> I agree with you, there was no question whatsoever of his competency.

Therefore, where a review of the record clearly reveals that appellant's plea was voluntarily entered and appellant presented to Judge Weinstein nothing more than a last minute desire to stand trial, the trial court properly denied appellant's request to withdraw his plea.*

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* Although Rule 32(d) of the Federal Rules of Criminal Procedure does not set forth an exact standard to be invoked in determining whether a court should permit withdrawal of a plea prior to sentencing, cases have established a more liberal standard for withdrawal prior to, than after, sentencing. See, *United States* v. *Presley*, 478 F.2d 163 (5th Cir. 1973); *United States* v. *Young*, 424 F.2d 1276 (3d Cir. 1970); Wright, Federal Practice and Procedure § 538.

However, it should be noted that other defendants in this series of FHA cases appeared before Judge Weinstein for sentencing to the same misdemeanor to which appellant pled guilty. (*United States* v. *Joshua*, 75 Cr. 29, sentenced: March 28, 1975; *United States* v. *Stroh*, 75 Cr. 70, sentenced: April 1, 1975; *United States* v. *Horowitz*, 74 Cr. 809, sentenced: April 4, 1975; *United States* v. *Libin*, 75 Cr. 125, sentenced: April 11, 1975; and *United States* v. *Shatzman*, 75 Cr. 69, sentenced: April 18, 1975.) These sentences, all roughly uniform, were imposed *after* appellant pled guilty, but prior to his sentence. Therefore, appellant could reasonably expect a sentence similar to those stated above and following this basic pattern of sentencing absent special circumstances. Because of this unique situation, the appellant's attempt to withdraw his plea at the time of his sentencing is analogous to that of a defendant attempting to withdraw a guilty plea after a sentence has been imposed. See, *United States* v. *Needles*, 472 F.2d 652 (2d Cir. 1973); *United States* v. *Fernandez*, 428 F.2d 578 (2d Cir. 1970). Taken in that sense it is clear that one may not withdraw a plea merely because he discovers the likely penalty that may be imposed. See, *Brady* v. *United States*, 397 U.S. 742, 757 (1970); *United States* v. *Lombardozzi*, 436 F.2d 878 (2d Cir. 1971).

POINT TWO

Appellant's plea and subsequent punishment were not barred by the statute of limitations.

Lastly, appellant contends that his plea of guilty to an information filed five and a half years after the alleged event, is barred by the applicable statute of limitations (Title 18, United States Code, Section 3282). Therefore, he argues that his plea of guilty was a nullity and the sentence imposed unlawful.

Appellant's contention finds no support in either the facts or law. On May 22, 1972 appellant was named in indictment 72 Cr. 596 which charged him with ten counts of bribery, ten counts of submitting false statements to the FHA, and one count of conspiring to do the same. Count 22 of this indictment charged that on or about September 11, 1969 appellant indirectly payed Edward Goodwin Fifty Dollars with intent to influence his official acts, in violation of Title 18, United States Code, Section 201(b)(1). (Appendix, *infra,* at A-1). After it was agreed that appellant would plead guilty to a misdemeanor arising out of one of the counts in 72 Cr. 596, the superseding information 75 Cr. 154 was filed on March 3, 1975 and appellant pled guilty to it on that date. This information charged that on or about September 19, 1969 appellant aided and abetted the supplementation of the income of a government employee, FHA Staff Appraiser Edward Goodwin, in the amount of Fifty Dollars, in violation of Title 18, United States Code, Section 209 and Section 2.*

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* In preparation of the bill of particulars for indictment 72 Cr. 596, the government became aware of the fact that the illegal payment which forms the basis for count 22 was, in fact, made on September 19, 1969, not September 11, 1969 as alleged in the indictment. Therefore, the bill of particulars for 72 Cr. 596 reflects this correction (Appendix, *infra,* at p. A-2). Consequently, when the superseding information was prepared it also reflected this corrected date.

There can be no question that the timely indictment 72 Cr. 596 properly tolled the statute of limitations for the crimes embraced in that indictment *United States* v. *Feinberg,* 383 F.2d 60 (2d Cir. 1967). Also, it is clear that the crime charged in the superseding information arose directly from the facts underlying count 22 of the indictment 72 Cr. 596 and thus, is not barred by the statute of limitations.

In any event, appellant waived the defense of statute of limitations by his plea of guilty. *United States* v. *Doyle,* 348 F.2d 715, 718-719 (2d Cir.), *cert. denied* 382 U.S. 843 (1965); see, *United States* v. *Parrino,* 203 F.2d 284, 286-287 (2d Cir. 1953); see also, Rule 12(b)(2), Federal Rules of Criminal Procedure, the accompanying Advisory Committee Note, and the discussion in Wright, Federal Practice and Procedure, Section 193.

Appellant's attempt to distinguish the instant case from *United States* v. *Doyle, supra,* because appellant was unaware of the statute of limitations prior to the entry of his guilty plea, must fail. In *United States* v. *Doyle, supra,* 348 F.2d at 718-719, the Court stated:

> In our view, the effect of a plea of guilty does not depend on whether an issue sought to be pressed on Appeal or in collateral attack might have been, or was in fact, properly raised in advance of trial. An unqualified plea of guilty, legitimately obtained and still in force, bars further consideration of all but the most fundamental premises for the conviction . . .

Moreover, our position that the plea of guilty is itself sufficient to waive the defect here alleged, finds support in the *Brady* trilogy of decisions by the Supreme Court (*Brady* v. *United States, supra, McMann* v. *Richardson,* 397 U.S. 759 (1970), and *Parker* v. *North Carolina,* 397 U.S. 790 (1970)). This basic principle upon which we rely was only recently reaffirmed in *Lefkowitz* v. *Newsome,* — U.S. —, 95 S. Ct. 886, 889 (1975). There the Supreme Court stated that:

> The *Brady* trilogy announced the general rule that a guilty plea intelligently and voluntarily made, bars the later assertion of constitutional challenges to the pretrial proceedings. This principle was reaffirmed in *Tollett* v. *Henderson, supra*, at 267: 'When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.'

The *Tollett* principle is plainly applicable here.

What we have here, is a situation where appellant, after protracted negotiations, entered into a plea bargain wherein he pled guilty to a misdemeanor arising out of the underlying indictment, and, in attempting to renege on this plea, confronted the trial court with a litany of groundless contentions, all properly rejected by the trial court.*

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* The government submits that appellant's further contention that the statute of limitations bars the imposition of any *punishment* incidental to a guilty plea (Appellant's brief, pp. 12-13) is an arbitrary bifurcation of the statutory language and inconsistent with the underlying purpose of the statute (18 U.S.C., § 3282). Were the statute to be interpreted as appellant would have us believe, then the anomolous situation would arise where a defendant could waive the statute of limitations defense for the purposes of pleading, and then resurrect the statute of limitations to bar his punishment. Such a situation would shackle the criminal justice system by disallowing proper criminal sanctions to attach to a defendant's legally obtained conviction.

CONCLUSION

The district court's denial of appellant's motion to withdraw his plea should be affirmed.

Dated: July 18, 1975

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
GARY A. WOODFIELD,
Assistant United States Attorneys,
*Of Counsel.**

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* The United States Attorney's Office wishes to acknowledge the invaluable assistance of Judith Scolnick in the preparation of this brief. Ms. Scolnick is a third year law student at Boston College Law School.

APPENDIX

Superseding Indictment

72 Cr. 596

(18, § 201(b)(1), § 201(c)(1), § 1010, § 371 and § 2)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

—against—

HARRY BERNSTEIN, ROSE BERNSTEIN, also known as Rose Shorenstein, EASTERN SERVICE CORPORATION, DONALD SHERMAN, FLATBUSH EQUITY CORP., HERBERT CRONIN, ROSE COHEN and EDWARD GOODWIN,

Defendants.

THE GRAND JURY CHARGES:

* * * * *

COUNT TWENTY-TWO

On or about the 11th day of September 1969, within the Eastern District of New York, the defendants HARRY BERNSTEIN, ROSE BERNSTEIN, also known as Rose Shorenstein and EASTERN SERVICE CORPORATION, corruptly and directly paid and the defendants DONALD SHERMAN and FLATBUSH EQUITY CORP. corruptly and indirectly paid approximately $50 to one Edward Goodwin, who was then and there an appraiser employed by the Federal Housing Administration of the Department of Housing and Urban Development, an agency of the United States, with intent to influence official acts of the said appraiser in connection with a property appraisal at 831 Bedford Avenue, Brooklyn, New York. (Title 18, United States Code, § 201(b)(1) and § 2)

Bill Of Particulars

72 Cr. 596

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

—against—

DONALD SHERMAN and FLATBUSH EQUITY CORP.,
Defendants.

The United States of America, as and for a Bill of Particulars, furnishes the following information:

* * * * *

As to Count 22, FHA # 373-134016 at 831 Bedford Avenue, Brooklyn, New York.

1. Approximate date of bribe:
   September 19, 1969
2. Approximate time of bribe:
   Between 5 and 6:30 P.M.
3. Place of payment:
   The office of Harry and Rose Bernstein at Eastern Service Corporation, 175 Fulton Avenue, Hempstead, New York.
4. Amount of payment:
   $50
5. Form of payment:
   Cash
6. Person who physically handed over money:
   Harry Bernstein
7. Property appraisal in FHA file.

★ U. S. Government Printing Office 1975— 614—353—124

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 18th day of July, 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a Brief and Appendix for the Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Thomas J. O'Brien, Esq.
2 Pennsylvania Plaza
New York, N. Y.

Evelyn Cohen

Sworn to before me this
18th day of July 1975

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4301966
Qualified in Kings County
Commission Expires March 30, 1977

E TAKE NOTICE that the within
esented for **settlement and signa-**
e Clerk of the United States Dis-
t in his office at the U. S. Court-
5 Cadman Plaza East, Brooklyn,
, on the ____ day of _____,
10:30 o'clock in the forenoon.

rooklyn, New York,
_____, 19____

_____
nited States Attorney,
ttorney for _____

_____
_____
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y for _____

SE TAKE NOTICE that the within
copy of _____duly **entered**
the ____ day of _____
_____, in the office of the Clerk of
District Court for the Eastern Dis-
New York,
Brooklyn, New York,
_____, 19____
_____
United States Attorney,
Attorney for _____

_____
_____
_____
ney for _____

_____ Action No._____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____
United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____
_____is hereby admitted.
Dated: _____, 19____

_____
Attorney for _____

FPI-LC-5M-8-73-7355